Nos. 24-109, 24-110

In the Supreme Court of the United States

STATE OF LOUISIANA,
Appellant,
v.
PHILLIP CALLAIS, ET AL.,
Appellees.

PRESS ROBINSON, ET AL.,
Appellants,
v.
PHILLIP CALLAIS, ET AL.,
Appellees.

On Appeal From The United States District Court For The Western District of Louisiana

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the State's intentional creation of a second majority-minority Congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Appellees.

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. In support of its Equality and Opportunity practice, PLF advocates for a color-blind interpretation of the United States Constitution and opposes race-based decisionmaking by governments. PLF has participated as amicus curiae in most of this Court's major redistricting and Voting Rights Act cases. *See*, *e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 889 (1996); *Chisholm v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Voting Rights Act of 1965 was one of the last century's most consequential and successful pieces of legislation. To deal with intransigent jurisdictions determined to prevent black Americans from exercising the franchise, the VRA "employed extraordinary measures to address an extraordinary problem."

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[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

Shelby Cnty. v. Holder, 570 U.S. 529, 534 (2013). It worked. *See id.* at 535 (noting that by 2012, black citizens of five of the six states most targeted by Section 5 of the VRA were registered to vote at a higher rate than white citizens). Indeed, things have improved so drastically that the VRA itself is now one of the main causes of racial discrimination in voting.

These cases are a stark example. Louisiana created a second majority-minority Congressional district to comply with Section 2 of the Voting Rights Act—even if it did so grudgingly. But the Fourteenth and Fifteenth Amendments prohibit racial discrimination. So how can the State legally sort voters by race? The problem is that this Court has long read Section 2(b) to create a cause of action for "vote dilution," on a theory that racial *groups* have a right to elect "representatives of their choice." 52 U.S.C. § 10301(b). This justifies state legislation explicitly based on race, done in the name of anti-discrimination. Yet the Constitution protects *individuals*, not groups. Each individual has a right not to be classified based on his or her race, but no group has a right to own any particular Congressional seat. Even to speak this way is to engage in the un-American assumption that a group of people vote as a bloc because of their skin color.

"Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). This Court has been steadily moving the Nation towards Justice Harlan's correct interpretation of the Constitution. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (*SFFA*). Race-based redistricting stands as a major exception. These cases present the Court with

the opportunity to excise race-based redistricting once and for all by simply treating it like any other form of racial discrimination that the Constitution condemns. To do this, the Court should clarify that while Section 2 still protects individuals from voting discrimination based on their race, it cannot constitutionally be read to protect group rights. Therefore, a State should not be entitled to rely on Section 2 to justify race-based redistricting.

ARGUMENT

I. Avoidance of Section 2 Vote Dilution Claims Cannot Justify Racial Discrimination

The central command of the Equal Protection Clause is "that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (cleaned up). Because "[e]liminating racial discrimination means eliminating all of it," this Court subjects every racial classification to the strictest judicial scrutiny. *SFFA*, 600 U.S. at 206. There are no exceptions. And because racial classifications are (rightly) so disfavored, strict scrutiny almost always spells doom for the government. It is "'strict' in theory, but usually 'fatal' in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984).

There is one glaring exception remaining to this principle. For decades, courts have accepted or assumed correct the argument that governments have a compelling interest to consider race in the drawing of electoral districts to comply with the Voting Rights Act. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) (continuing this Court's trend of

"assum[ing], without deciding, that the State's interest in complying with the Voting Rights Act was compelling," then upholding the challenged districts); *Prejean v. Foster*, 227 F.3d 504, 515 (5th Cir. 2000) (interpreting *Bush v. Vera*, 517 U.S. 952, 977 (1996), to mean that a "state has a compelling interest in complying with the results test of Section 2 of the Voting Rights Act, which may lead it to create a majority-minority district only when it has a 'strong basis in evidence' for concluding . . . that, otherwise, it would be vulnerable to a vote dilution claim" (quoting *Bush*, 517 U.S. at 994 (O'Connor, J., concurring))); *Walen v. Burgum*, 700 F. Supp. 3d 759, 775 (D.N.D. 2023) (three-judge court) (rejecting racial gerrymandering claims because "even assuming race was the predominate motivating factor, . . . the State's decision to draw subdistricts . . . is narrowly tailored to the compelling interest of compliance with the VRA"). The underlying assumption is that Section 2 *requires* some consideration of race to prevent "vote dilution." If this is true, then these applications of the statute cannot coexist with the Equal Protection Clause. It follows that a State cannot avoid liability for racial gerrymandering by pointing to fear of a vote-dilution claim.

A. Section 2 Is Unconstitutional as Applied to Vote Dilution

Simply put, Section 2 of the Voting Rights Act is unconstitutional as applied to vote dilution. To begin with, Section 2(b)—which provides the basis for vote-dilution claims—assumes that "members of a class of citizens protected" by the VRA can, collectively, have "representatives of their choice." 52 U.S.C. § 10301(b). It further assumes that the number of "members of a protected class" who "have been elected to office in the

State or political subdivision" is relevant to whether that class of voters, collectively, has been able to elect "representatives of their choice." *Ibid.* In short, Section 2(b) assumes that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). This Court has rightly rejected such characterizations as "impermissible racial stereotypes." *Ibid.*

Indeed, to faithfully apply Section 2(b) to a claim of vote dilution, a court would have to start with the indefensible position that "all individuals of the same race think alike." *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 308 (2014) (plurality opinion) (rejecting this proposition as not "serious"); *accord SFFA*, 600 U.S. at 220-21. From there, it would have to "probe how some races define their own interest in political matters." *Schuette*, 572 U.S. at 308. Even if this were a legitimate exercise for a federal court to undertake, expert political consultants the parties pay to appeal to racial blocs of voters fail at this every election cycle.[2] Federal judges are experts in the law, but they are not competent to determine the collective interest of black voters in Louisiana. Nobody can do this, because each individual voter is an individual, not simply a member of his or her racial group.

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[2] *See, e.g.*, Mike Madrid, *While Democrats Debate 'Latinix,' Latinos Head to the G.O.P.*, N.Y. Times (Mar. 22, 2022), https://tinyurl.com/4fwkcd9m ("Both parties have committed a mind-boggling form of political malpractice for years: They have consistently failed to understand what motivates Hispanic voters, a critical and growing part of the electorate.").

This Court's prior efforts to police vote dilution have done little but "balkanize us into competing racial factions," driving us "further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 509 U.S. at 657. How can we hope to reach such a goal while governed by a statute that instructs courts to determine the existence of "Latino opportunity districts" and punish states for *failing* to create such districts. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436-42 (2006) *(LULAC).* In a world where individuals, rather than cohesive racial factions, participate in the political system, it makes no sense to speak of a "Latino opportunity district." This presumes that Latino voters all agree that they should act as a bloc to elect "representatives of their choice." 52 U.S.C. § 10301(b). What actually happens—and what should happen—is that each Latino voter goes to the polls and votes for the candidate of *his or her* choice, not the choice of the group.[3]

Though case law provides some safeguards against the abuse of vote-dilution claims, these merely pay lip service to the statutory command that Section 2 does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." *Ibid.* The most important safeguards are the "preconditions" that a plaintiff must satisfy before reaching Section 2's "totality of the circumstances" inquiry. Namely, that "a bloc voting majority

[3] Indeed, the district this Court invalidated in *LULAC* contains many heavily Latino counties whose votes have shifted towards the Republican Party in recent years. Group preferences can change over time, which is just one reason why groups cannot have a "candidate of their choice."

must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986); *see also Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (describing the three preconditions as: "compactness/numerousness, minority cohesion or bloc voting, and majority bloc voting"). But if these conditions are satisfied, Section 2 very well *might* effectively grant a right to proportional representation by race. It is no accident that officials often interpret the VRA as requiring them to draw majority-minority districts. *See, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 400 (2022) ("The Governor argued that the addition of a seventh majority-black district was necessary for compliance with the VRA.").

Perhaps more importantly, though, even where plaintiffs can demonstrate the *Gingles* preconditions, it does not change the basic fact that voters are individuals. Though they may be of the same race and tend to vote for the same candidates, these are not the only facts about them. A group of individuals might vote for the same political candidates for any number of reasons, but Section 2 simply assumes that minority voters are doing so because of their race. The resulting system is "little different from a working assumption that racial groups can be conceived of largely as political interest groups." *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring in the judgment).

"It is a sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting part). Section 2 vote-dilution claims have drafted the federal judiciary into this effort for decades. But it need not continue indefinitely. Just as

this Court declared long-established racial discrimination in university admissions unlawful in *SFFA*, it can strike a similar blow against race-based districting here. In both cases, treating people as if they solely exist as members of their racial group is "contrary . . . to the 'core purpose' of the Equal Protection Clause." *SFFA*, 600 U.S. at 221 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

B. The Equal Protection Clause Must Have Equal Force Against Racial Gerrymandering

Holding Section 2 unconstitutional as applied to vote dilution clears the path for federal courts to apply general equal protection principles to racial gerrymandering claims. That is, that strict scrutiny applies so long as it is shown "that a discriminatory purpose has been a motivating factor in the decision." *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). A discriminatory purpose need not manifest in a desire to harm members of a particular group. After all, this Court has long recognized that because the Constitution protects "*persons*, not *groups*," even seemingly "benign" racial discrimination must satisfy strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Nor, in normal circumstances, would a challenger have to show that sorting voters by race was a "dominant" or "primary" purpose of the map. *Arlington Heights*, 429 U.S. at 265.

But, perhaps in service of the idea that some consideration of race is unavoidable in redistricting, this Court's racial gerrymandering precedents have demanded a more stringent showing. These cases hold

that "strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). These cases cite *Arlington Heights* for its inquiry into facially race-neutral discrimination, but *Arlington Heights* squarely rejected the "predominant factor" inquiry. Instead, the *Arlington Heights* Court understood that "[r]arely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary one.'" *Arlington Heights*, 429 U.S. at 265. By ignoring this fact in gerrymandering cases, the Court permits racial considerations to seep into districting decisions.

Like disparate-impact liability generally, the very existence of Section 2 vote-dilution claims forces the government to consider race to avoid liability. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (observing that disparate-impact liability in employment discrimination "place[s] a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes"). That consideration of race would normally trigger strict scrutiny under *Arlington Heights*. *See Miller*, 515 U.S. at 913 ("outside the districting context, statutes are subject to strict scrutiny . . . when, though race-neutral on their face, they are motivated by a racial purpose or object"); *see also Ricci*, 557 U.S. at 579 (majority opinion) (throwing out the results of a promotion exam because of the racial makeup of those who passed "would violate the disparate-treatment prohibition of Title VII"). But with the shadow of Section 2 always looming, consideration of race in redistricting has become so "inevitable" that courts no

longer view it with the appropriate level of skepticism. *See* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. Pitt. L. Rev. 1, 18 (2010) ("[I]n the districting cases, the Court repeatedly held that since some use of race is inevitable," strict scrutiny "will only apply . . . when race is the predominant factor in district line drawing. By contrast, in remedial affirmative action cases, the Court has held that it will apply strict scrutiny to all cases where any racial classification is used by the government.").

This perversion of the Equal Protection Clause should not stand. Section 2 has carved out a space for race-based redistricting, but there is no exception in the Fourteenth Amendment for districting legislation. Section 2 *encourages* racial gerrymandering for the sake of compliance with a vague system of proportional representation. Once this Court holds that Section 2's application to gerrymandering is unconstitutional, it need no longer tolerate the use of race in districting. Drawing district lines is a complex exercise involving many political considerations, but "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265.

II. Section II's Core Applications Remain Constitutional

In reaching these conclusions, the Court need not weaken Section 2's core protections against racial discrimination in voting. The same language of Section 2(b) that requires racial stereotyping when applied to vote-dilution claims does not demand the same to determine whether a "voting qualification or prerequisite to voting or standard, practice, or procedure . . .

results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). When applied in that context, Section 2 is an "equal-treatment requirement," not an "equal-outcome command." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). It is therefore consistent with the individual right to be free from racial discrimination, which is the central tenet of the Equal Protection Clause.

Last decade, a series of lower-court cases threatened to upend this understanding and transform Section 2's "results test" into a prohibition of any voting procedure that might disparately affect members of some minority group. Those cases invalidated universal time, place, and manner voting rules like photo identification requirements, limitations on the counting of votes cast in the wrong precinct, and the number of days permitted for early voting. *See Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated as moot by* 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (early voting); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (photo identification); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (early voting, same-day registration, out-of-precinct voting); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (out-of-precinct voting, ballot collection). These cases embraced an interpretation of Section 2 that privileged group-based rights. Remarkably, this reading also hinged almost entirely on how well members of the protected group turned out to vote under the challenged system. *But see Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) ("a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage" than other groups).

It was the epitome of an "equal-outcome command." *Frank*, 768 F.3d at 754.

In reversing the Ninth Circuit's *Hobbs* decision, this Court rejected this framework. Instead, the Court emphasized that Section 2's requirement that the political process be "*equally open* to participation" means *equality of opportunity*, not *equality of outcome*. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 667-68, 674 (2021). So it rejected the sole focus on disparate impact in favor of an exhaustive look at the circumstances designed to show whether a state's voting apparatus is indeed *equally open* to everyone. *See id.* at 668-72. Relevant factors include the magnitude of the burden on the right to vote, how much the practice deviates from the norm when Section 2 was enacted, an assessment of the state's entire voting apparatus, and the nature of the state interest involved. *See ibid.* Disparate impact might be relevant, "[b]ut the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote." *Id.* at 671. This all-inclusive inquiry allows courts to avoid group-based claims and focus instead on whether the state has actually burdened the voting rights of "any citizen . . . on account of race or color." 52 U.S.C. § 10301(a).

Many commentators accused the *Brnovich* Court of rewriting Section 2 and neutering its effectiveness.[4]

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[4] *See* Brennan Center for Justice, *Brnovich v. Democratic National Committee* (July 1, 2021), https://tinyurl.com/mvksr9w3 (asserting that "the U.S. Supreme Court made it more difficult to challenge discriminatory voting laws in court by rewriting the law that applies to lawsuits under Section 2 of the Voting Rights Act of 1965"); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer,

But by clarifying that racial discrimination in voting is not synonymous with disparate impact, the Court actually shielded Section 2 from constitutional attack. "Disparate impact doctrine's operation requires people to be classified into racial groups, and liability hinges on a comparison of the statuses of these groups." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 564 (2003). An interpretation of Section 2 based almost entirely on disparate impact, especially without any semblance of a causation requirement, "might cause race to be used and considered in a pervasive way and 'would almost inexorably lead'" to the use of strict racial quotas. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 542 (2015) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)). In short, it would have encouraged race-based decisionmaking almost every bit as much as does the current vote-dilution precedent.

Instead, the Court avoided that outcome and focused Section 2's core prohibition on discrimination against individuals because of their race. And in this role it still "provides vital protection against discriminatory voting rules." *Brnovich*, 594 U.S. at 678. This includes cases decided under the "results test," where no discriminatory intent is present. *See id.* at 667, 683 (acknowledging that proof of discriminatory intent is not necessary to prevail on a Section 2 claim). Thankfully, this type of discrimination is rare today. But it still exists, and courts still find Section 2 violations under this theory. *See Brooks v. Gant*, No. CIV-12-

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The Court's Voting-Rights Decision Was Worse Than People Think, The Atlantic (July 8, 2021), https://tinyurl.com/86ydyhc5 (arguing that *Brnovich* will "sideline" Section 2 "permanently").

5003-KES, 2012 WL 4482984, at *1, 6–7 (D.S.D. Sep. 27, 2012) (Section 2 results violation where a county with a large Native American population allotted fewer days of early voting than majority-white counties elsewhere in the state, denying an equal opportunity to cast a ballot).

Put simply, holding Section 2's vote-dilution applications unconstitutional will not stop the Voting Rights Act from performing its basic duty. Instead, much like *Brnovich*, it would focus the statute on the type of discrimination that the Equal Protection Clause forbids—discrimination against an individual because of his or her race. At the same time, such a decision would reduce the pressure on jurisdictions to consider race when drawing electoral districts. It would be an important step towards achieving "the constitutional promise of equal treatment and dignity." *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 388 (2016).

CONCLUSION

Amicus respectfully asks the Court to affirm the judgment below.

Respectfully submitted,

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